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ABSTRACT

While the government of South Africa has outwardly promoted democracy since 1983, it nonetheless has placed its press under tight constraint to discourage dissent concerning political issues and enhance the government's credibility. Not only are journalists within the country restricted, but foreign correspondents as well. Moreover, although there are no official censors, censorship is implied by the laws because journalists are restrained from commenting freely and the subject matter on which they may report is limited to issues that are not contentious. The laws are so vague that journalists could easily report something the government subsequently objects to, which engenders a form of self-censorship. South Africa's government states that its mission is democracy, but its reaction concerning free speech contradicts its assertions. A free press is necessary to a democracy because it promotes discussion and dissent, which in turn fosters public consensus. The government, however, believes a free press to be dangerous to its well-being until a democracy is established. South Africa's government needs to understand that a free press is not a product of a democracy but an essential element of the process of peaceful change. (Forty-three references are included.) (JC)

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News According to Pretoria: A Legal Perspective Concerning the Suppression of Free Speech in South Africa

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As we approach the end of the twentieth century the concept of free speech has not received universal acceptance. For practicing journalists in South Africa, suppression is a significant and daily problem. South African journalists are under the most severe of restrictions. This is particularly distressing when considering South Africa's position as a "western" country. The South African government has claimed that it is committed to freedom of the press, but qualifying it by adding "as long as the press reports responsibly." (Bowen, 1986) Therein lies the ambiguity which allows for a wide range of supression.

In a democratic society, the role of free speech has been to generate argument, debate, and dissent. It is through this process that public concensus may be reached. Paradoxically, South Africa has chosen to discourage this process. South Africa has maintained high standards and a tradition of press freedom, but today these standards and tradition are being tested. On June 12, 1986, Pretoria declared a national state of emergency, imposing yet further press controls. Johannesburg's Business Day editor wrote, "South Africa is today a country without a free press, without the rule of law, without the full protection of the courts and without the basic rights to speak freely, to assemble or protest." (Jones, 1986) His words are powerful in light of his risking arrest. Free speech in South Africa has reached a twilight phase (Heard, 1986).

This paper will examine the suppression of the free press in South Africa. In order to understand the present situation, an historical review of the South African Press and the laws that governed it will be provided.

The Constitutions and laws governing freedom of the media in both South Africa and the United States will be examined. Legal implications regarding free press and censorship will be discussed and evaluated. The South African Constitution and statutes will be examined in light of free speech. Finally, the implications of these restrictions for social reform will be reviewed.

The Press of South Africa

The tradition of press freedom in South Africa goes back some 150 years. Europeans had been at the Cape for more than a century and a half before the first newspapers, The Capetown Gazette and African Advertisor, were both founded in 1800 (Muller, 1969). Conflicts between the press and government in South Africa began as early as 1823 when colonists clashed with the notorious Lord Charles Somerset, British Governor of the Cape. They won their freedom to publish subject only to the law of libel (Barton, 1966).

Throughout the 19th century newspapers and journals spread through South Africa. After initial freedom to publish was won, successive attempts by the government to suppress print were instituted. In 1896, the issue of free expression was once again confronted. A press law passed by the Transvaal Volksraad required that the names of printers and publishers be disclosed. In addition the President was given the power to prevent publication of material considered to be dangerous to the order and peace of the Republic or to good morals. The court later ruled, however, that the law made provision for suppressing matters after publication and gave no power to prevent matter being printed in the future (Potter, 1975). Until after World War II the press maintained a large degree of editorial independence.

There are in South Africa two quite different types of newspapers which display a unique dichotomy in politics: the English-language and the Afrikaan. The English-language newspapers began as business enterprises fashioned in the style and content of the English press. Prior to 1948, before the Nationalist takeover, the English-language press enjoyed a large measure of freedom, but it restricted itself to the protection of the rights of English speaking South Africans in the white democracy. The English press and its promoters saw the Nationalists government as being hostile to the interests it had for so long represented. The accessibility of the English-language press to all racial and linguistic groups had serious consequences. The Nationalist government believed the press presented an unacceptable view of society.

In its earliest years the Afrikaan-language press was associated with Afrikaaner nationalism. It started out to create a language, a culture and a people and was an integrated part of the National party (Potter, 1975). Where the English newspapers were dominated by commercial and managerial demands and where printers were sovereign, the Afrikaan-language press was always subservient to the cause it supported.

Since 1948, the English-language press has come to function as an external opposition. It reinforced its role by fulfilling the traditional political function of "watchdog" and representative of minority or majority opinion, or interest. The Afrikaan-language press on the other hand served primarily as a governmental machine for political outputs. As time passed, however, it too began to function as an opposition (Potter, 1975). Although the press of South Africa has had a difficult path, it is the most technologically and journalistically advanced in Africa with over

700 newspapers, periodicals and journals published regularly (South African Yearbook, 1985).

The South African Broadcasting Corporation was established in 1936 and was modelled on the British Broadcasting Corporation (South African Yearbook, 1985). South Africa's radio network is government controlled. It is interesting to note that South Africa has had television service only since January of 1976. The delay is attributed mainly to the fear within the ruling National Party that television would release unsettling forces on South Africa. Because radio and television services are government controlled, officials are less concerned with these media.

With the takeover of the Nationalist government a new struggle aroused the issue of press freedom. Governmental complaints are twofold: first, the press is dominated by the well financed high circulation of the English-language newspaper groups, which do not support apartheid and have a tradition of criticism; second, South African journalists contribute to hostility for apartheid abroad by presenting it negatively (Ainslie, 1966). The South African press has been allowed to function, but only under the tight reign of the Nationalist government. The problem for the press is that while the government cannot control newspaper readership, it can restrict the presses content. Publications which were predominately political and openly opposed to the new rulers were eliminated without reservation (Barton, 1966). The governments attitude to the press resulted in the emergence of a complex variety of direct and indirect pressures which had the intention of regulating the political content of newspapers.

Legal Constraints on Free Speech in South Africa

The South African government's mission is to establish a democratic political order. In his address of January 31, 1986, President P.W. Botha declared that "we have outgrown ... the outdated concept of apartheid, we accept an undivided Republic of South Africa...one citizenship for all Africans and a democratic system of government." (Heunis, 1986, p.33) In 1983 the government had demonstrated its commitment to a democracy by calling for its first tricameral parliament, representing Whites, Coloureds, and Indians in a new South African Constitution. The basic premises of the constitution and the national goals to be realized with its implementation are set out in the preamble:

> To uphold Christian values and civilized norms, with recognition and protection of freedom of faith and worship,
>
> To safeguard the integrity and freedom of our country,
>
> To uphold the independence of the judiciary and the equality of all under the law,
>
> To secure the maintenance of law and order,
>
> To further the contentment and the spiritual and material welfare of all,
>
> To respect and protect the human dignity, life, liberty and property of all in our midst,
>
> To respect, to further and to protect the self-determination of population groups and peoples,
>
> To further private initiative and effective competition...

Those who argue that free speech is inherent to a democracy must question

the sincerity of the South African governments intentions or their interpretation of a democracy when considering the constraints placed on the press.

The fact that the government is dedicated to achieving democracy is clear. Unfortunately when South Africa became a union in 1910 no provision was written into the basic law to entrench free speech along the lines of the First Amendment in the United States. It was not until 1948 when the Nationalist party came to rule that free expression was legitimately questioned. One of the first acts of the present government was to set a Press Commission in 1950 to inquire into accurate presentation of news in the South African press with regard to selection of news, the mixing of fact and comment, the use of inaccurate information as news, or as a basis for comment, and the adequacy of both local and overseas correspondents, editors, and journalists serving newspapers and periodicals (Potter, 1975). It was nearly twelve years before the Commission published the first section of its report which covered the tendencies toward monopoly in the control of the press and collection of news, and the distribution of newspapers (Ainslie, 1966). The Nationalists concern with the press is revealed by establishing the Press Commission immediately after coming to power. Two assumptions can be made regarding the proposal of the Commission. First, that a free press was desirable, despite the disciplinary rider; and second, that the Commission started from the assumption that this freedom was being abused (Potter, 1975). Although no legislation emerged as a result of the Commission it did serve as a kind of detering threat. The result was self- censorship, making every journalist more cautious of what he/she wrote.

Throughout the fourteen years of the Commission, Ministers made constant reference to the sanctions that would be imposed once the Commission's findings were made public (Potter, 1975). In 1963, the Publications and Entertainment Act was enacted providing for pre-publication censorship. The South African press was excluded from the provisions of the Act, but was forced to introduce a self-disciplinary Code in exchange for which members of the Newspaper Press Union (NPU) were excluded from the Acts provisions. In 1962 the text of a draft Code of Conduct for the press and of a proposed constitution for a Board of Reference to give effect to the code, was issued by the NPU (Potter, 1975). The Code of Conduct contained a clause (3d) which was believed to restrict the political content of newspapers. The clause read, "While the press retains its traditional right of criticism, comment should take cognisance of the complex racial problems of South Africa, the general good and safety of the country and its peoples." (Potter, 1975) Again in 1977, the government produced a press bill calling for the establishment of a statutory press board to supplant the one created by the NPU, a widening of the Press Code, and as an ultimate stricture, the closing down of newspapers after due process. The government's case boiled down to the proposition that self-discipline by the press had not worked. The bill was withdrawn, but it resulted in a strengthening of the Press Code, a speeding up of the Press Board procedures, and representation for the public on the board, without affecting its status as an institution of the press, and not of the state (South African Yearbook, 1985).

Suppression of free speech is usually limited to contentious issues. The main statutory restraints are in the areas of defense, security, police and prison reporting. Pakendorf (1986) divides the restraints into three categories:

> "The first one touches elements not uncommon in western society: protection for children, no reporting on divorce cases, libel and the like. The second has to do with the particular circumstances the country finds itself in; thus no reporting on arms or oil procurement, troop movements, and such matters ... It is the third category that is really burdensome because it largely touches the field of human rights as well as freedom of expression directly." (p. 123)

The list of legal restrictions on the press runs to one hundred or more, many of them bearing heavily on journalists. Due to such a large number only a few will be considered. The South African government has made provisions concerning journalists and defense. The Official Secrets Act of 1956 made it an offense to publish information relating to official secrets, defense and atomic energy. A 1965 amendment extended the bounds of the original Acts scope by making it an offense not only to publish, but even to possess any document of information which relates to "munitions of war or any military or police matter." (Potter, 1975). The inclusion of "police matter" in the Act aroused particular concern among journalists. South African lawyers and the daily press have warned that the Act is so framed as to prevent newspapers from publishing even the names of persons arrested for political offenses. The Rand Daily Mail alleged in an editorial that the act opens the way to a Secret Police

(Ainslie, 1966). The Official Secrets Act in conjunction with the Defense Amendment Act of 1967 created a virtual blanket prohibition on all matters connected with South Africa's defense without the express permission of the Minister of Defense. The extensiveness of the Defense Act's provisions led most newspapers to refer all matters connected with defense to authorities prior to publication (Potter, 1975).

The Nationalist government greatly extended its existing powers for controlling the press with the Suppression of Communism Act in 1950. Under Section 6, the Governor General or State President was able to ban any publication aimed at furthering the principles or promoting the spread of communism. Under the Act, it became an offense to publish information to further the achievement of any of the objects of communism. In addition the State President was empowered to ban any organization which he deemed to be unlawful (Ainslie, 1966). In terms of the Act this would prevent the publication of any of that organization's expressed views. Because the definitions of communism were so ambiguous it was difficult for an editor to know whether or not he was breaking the law. An amendment to the Act was passed providing that anyone banned under the Suppression of Communism Act could also be banned from having anything to do with the publication of any newspaper or periodical or from being quoted or published in the press (Ainslie, 1966). Further amendments to the Act prohibited newspapers from publishing any statements regardless of subject matter, by a banned person without the express permission of the Minister of Justice. These regulations probably produced the most serious inroads into the free functioning of the press. Editors were compelled to keep a constantly

updated list of banned persons and make daily reference to it. Publication of political statements inside the courts was permissable providing that the evidence or statement is relevant to one of the issues in the trial and the occasion isn't abused for the airing of political views. It is up to the papers to make the difficult decision as to what was relevant and irrelevant. The intention and effect of this Act and its amendments was to eliminate an entire segment of political opinion from the public arena (Potter, 1975).

In order to prevent laws being subject to ridicule, the government passed the Criminal Law Amendement Act in 1953 (Potter, 1975). This Act served to increase penalties for going against the country's laws by way of protest or in support of a campaign against or for the repeal or modification of any law-or by the use of language or any other action calculated to cause the commission of such an offense. The terms of this law made it extremely difficult for editors to speak freely or criticize an existing law or the enactment of any future laws, for there was no way of knowing whether criticism might not result in the law being broken again. Strictly interpreted, by reporting an inflammatory speech or appealing for the support of a campaign or organization which might show contempt toward the law, a newspaper might find itself breaking the law. As newspapers had no means of foretelling the whether a said speech or campaign would result in others breaking the law they were always at risk (Potter, 1975).

Under the provisions of the Public Safety Act, a law passed at the same time as the Criminal Laws Amendment Act, the government was empowered to declare a state of emergency in the event of unrest and to suspend any legislation considered inconsistent with its regulations (Potter, 1975).

Following the Sharpeville crisis in 1960 a state of emergency was declared in the country with even further repercussions for the press. The government was entitled under the emergency regulations to prohibit the printing, publication or dissemination of material considered to be subversive and it became an offense to publish or disclose the name or identity of any person detained or arrested under the emergency regulations (Potter, 1975). A subversive statement may include anything from encouraging divestment to weakening or undermining public confidence.

With the passage of the Criminal Procedures Act of 1955 there is no protection for journalists and the confidentiality of their sources. The Act provided for the subpoena of witnesses to answer questions before a magistrate (Ainslie, 1966). This clearly causes concern for working journalists. If the police believe that an individual possesses any information which might help in an investigation, they have the right under Section 83 to force disclosure (Potter, p.126).

Clearly, publications concerning the issue of apartheid is of utmost importance to the South African government. Under the Riotous Assembly Act of 1956 the government could ban a publication which it considered to be calculated to engender hostility between one racial group and another. Thus, if a newspaper referred to the grievances of the African vis-a-vis the Whites or of Coloured vis-a-vis the Indians, its editor runs the risk of being jailed or heavily fined (Potter, 1975). This Act was clearly a consideration when they gave the Sharpeville massacre in 1960, (where a number of Africans protesting were shot by the police), far less adequate coverage than it received abroad. The famous Sharpeville photographs were

never published in any South Africa newspaper (Ainslie, 1966). The Native Administration Act (No. 38 of 1927) made provision for penalizing the promotion of hostility between Africans and Whites. It differed from the Riotous Assembly Act, however, in that intent had to be proved (Potter, 1975).

Following a series of exposes in South African papers about conditions in jails, the government passed the Prisons Act in 1959. This provided penalties of a large fine or a year's imprisonment for "any person who, without the authority in writing of the Commissioner of Prisons, publishes or divulges any information concerning any prisoner, ex-prisoner or the administration of any prison." (Potter, 1975, p.123) It became an offense under the Act to sketch or photograph any prisons or prisoners. When the Rand Daily Mail did publish an exposure on prison conditions in 1965, the government retaliated by charging all those who had supplied information under the Prisons Act, or alternatively with perjury (Ainslie, 1966). The press could, however, cover prisoners once they became the subject of court cases.

The Police Act contains a similar restraint to that of the Prisons Act. The reporting of police activities is made onerous through a device that sounds reasonable. The Police Amendment Act of 1978 made it an offense to publish "any untrue matter in relation to any action" of the Police Force (South African Yearbook, 1985). It becomes an offense to publish untrue matter about police without having reasonable ground for believing it true. Again, the wording is ambiguous. The question becomes "what are reasonable grounds?" The onus rests on the accused to prove that reasonable steps were taken. Article 27(B) of the Police Act states that

the accused is presumed to be guilty until he can prove his innocence, whereas one is normally presumed to be innocent until the state has proved the contrary (Potter, 1975). This clause says that if any untruth about the police is published, one is liable to a jail sentence or fine-unless of course one can prove one's innocence. Since this is frequently difficult, it is a severely inhibiting factor when it comes to reporting possible police misdemeanor.

South Africa has placed the traditional "watchdog" of government on the shortest leash possible. Their objectives are clear-to place constraints on the press in order to discourage dissent concerning political issues and enhance the government's credibility. There are two significant implications regarding free press and censorship that arise from these legislative restraints. First, the laws not only concern journalists within the country, but foreign correspondents as well. The government continues to voice their distress over the way the country has been depicted to the rest of the world. It is their attempts to erase these images by imposing sanctions on the foreign press. Second, although there are no official censors, censorship is implied by the laws. Journalists are restrained from commenting freely and the subject matter on which they may report is limited to issues which are not contentious. The laws are so vague journalists could easily report something the government subsequently objects to. The ambiguity of the regulations impose a smothering form of self-censorship.

Press Controls: Their Impact for South Africa

The impact of these legal restraints concerning free speech in South Africa was realized with the declaration of a state of emergency. On June 12, 1986, President P.W. Botha called for a national state of emergency in anticipation of unrest due to the anniversary of the 1976 Soweto riots. The state of emergency made it impossible to report events first hand or confirm secondary sources. The new rules placed over 170 foreign print, radio and TV correspondents under threat of fines or imprisonment up to ten years for violations (Bowen, 1986). The Sowetan, a black-run daily appropriately summarized the situation with the heading, "ALL QUIET ON JUNE 16," then adding in smaller type, "AND IF ANYTHING DID HAPPEN WE'RE NOT ALLOWED TO TELL YOU." (Smith, 1986) South Africa's emergency decree extended the authorities powers of censorship further. The purpose of the decree was to heighten confidence and create stability inside the country. No evidence was to emerge that would contradict the government's overall contention. In addition to previous legislation the decree presents further legal restraints on journalists, both internal and external.

The decree basically stifled reporting on virtually anything linked to the state of emergency the government cared to restrict. The coverage of any unrest situation or the activities of security forces was prohibited without express permission. Unauthorized tape or photographs of a policeman or soldier on duty was not permitted to be taken or printed. Any reporter who used the terms "White minority" and "regime" to describe the government was placed in jeopardy (Bowen, 1986). It became illegal to disclose the name or identity of any person arrested in terms of any provision of the regulations without government consent. Of all the rules,

prohibiting publication of "subversive statements" was the most ambiguous. A subversive statement is that which contains anything which is calculated to have the effect or is likely to have the effect (Texts of South African Press Restrictions):

> -of promoting any object of any organization which has, under any law, been declared to be an unlawful organization;
>
> -of inciting the public or any person or category of person to: take part in any unlawful strike; take part in or support any boycott action; take part in any unlawful demonstration, gathering or protest procession; take part in any acts of civil disobedience, or discredit or undermine the system of compulsory military service
>
> -of inciting the public or any section of the public or any person or category of persons to resist or oppose the Government or any minister or official of the Republic or any member of the force, in connection with any measure adopted in terms of any of these regulations or in connection with any other measure relating to the safety of the public or the maintenance of public order or in connection with the administration of justice;
>
> -of engendering or aggravating feelings of hostility in the public or any person or category of persons toward any section of the public or person or category of persons toward any section of the public or person or category of persons;
>
> -of weakening or undermining the confidence of the public to commit any act or omission which endangers or may

> endanger the safety of the public, the public order or the termination of the state of emergency, or
>
> -of encouraging or promoting disinvestment or the application of sanctions or foreign action against the Republic.

In regard to sending news reports abroad, foreign correspondents are affected by: the prohibition on the presence on the scene of unrest and security actions; the prohibition on the taking of photographs and the making of recordings of unrest and security actions (South African Embassy). A number of news reporters did what they could to circumvent the bans. Anthony Robinson of London's Financial Times came up with an inventive approach concerning an article on Pretoria hoarding oil in case the West imposed sanctions. Because that would be illegal, "Robinson wrote the South Africans were doing something akin to what Joseph advised the Pharoah in Gen.41:35-6: to store grain against the seven years of famine which are to befall the land of Egypt." (Whitaker and Manning, 1986). South Africa has since imposed tighter regulations, closing many loopholes. The country still continues under the state of emergency.

Free Press in America: The Ideal?

The fact that the First Amendment to the United States Constitution guarantees freedom of speech and extends constitutional protection to the press reflects the views of our founders that citizens could be adequately informed about their government through a non-restricted press. In the United States the role of the media has been that of government watchdog, providing information for the people on which they base their decisions.

Much of governmental information is accessible to journalists. Until the passage of the Freedom of Information Act (FOIA) in 1966, however, there has been a long standing legal tradition for the government not to communicate. This Act was the first comprehensive legislation in defense of the people's right to know. The basic policy of the FOIA was "any person should have clear access to identifiable agency records without having to state a reason for wanting the information and that the burden of proving withholding to be necessary is placed on the Federal Agency." (Roberts, 1981) The FOIA requires the government to release documents upon request, with the exception of classified defense information, trade secrets of a business, internal memoranda and certain other information. The government must release documents unless they fall into one of the exempted categories and policy keeps them from divulging it. Prior legal sanctions had worked more in favor of secrecy than disclosure.

Whereas the press takes much less risk in violating security and privacy, the government has to protect its own security and the privacy of individuals. A 1974 amendment to the FOIA required government agencies not to release personal information about individuals (Smith, 1981). Exceptions to the Privacy Act included consent of the individual, the release of personal information to another government agency for civil or criminal law enforcement, to Congress, and as a result of a court order. Thus the journalist may find it difficult to secure an individual person's information. It would appear that the United States has provided an ideal situation for journalists. Critics question the impact of the FOIA on government.

Clearly, free press in the United States is not ideal, however, it does adhere to the principles of a democratic society. Although South Africa seeks a democracy, it fails to recognize and act upon the link between democracy and free speech. In a society where the majority is suppressed, free speech must necessarily be regulated. In order to resolve the political issues that burden the country, access to and understanding of the issues must be encouraged. When critical choices are pending, the public is better informed to make realistic decisions. Only through free speech and debate can South Africa hope to reach a peaceful solution to its political dilemmas.

Conclusions

The South African government has indeed presented a challenge to journalists. It has attempted to deal with social unrest by controlling the press with numerous legislative acts. The reaction of the government to its press has been similar to that of a parent attempting to discipline a rebellious child. Just as the child finds ways to circumvent his or her punishment, so the South African press have found loopholes in certain laws. Additional legislation, however, has closed many loopholes.

South Africa is a government whose stated mission is democracy. However, its reaction concerning free speech has only served to contradict these statements. A democratic nation relies heavily on its public information system and public debate of issues and policy. The public information system provides communication channels through which citizens learn of the activities of government while conveying to the government his or her views and needs. As Nelson and Teeter (1969) noted "Only

through a clash of ideas in the open market place can working truths be arrived at; the widest diversity of opinion and information must course through the channels of debate and discussion in arriving at solutions to problems and sound public policy." (p.3) Thus the role of free speech in a democratic society has been to facilitate public argument and dissent. This in turn has fostered public consensus. Although values of free speech and press are strong, there are circumstances where other values may take priority and win in a conflict over rights. This is the case of South Africa. The present government believes that a clash of ideas concerning governmental issues is undesirable for the country's well being. Their position is made easier by the fact there is no provision for free speech in the South African Constitution.

Free speech has the potential to enhance a government's credibility both internally and externally. The South African government believes they are providing for the well being of the country by restricting the press. However, this has served to undermine its credibility. In the United States, a free and independent press serves as the "watchdog" of government, thus enhancing government credibility. A free press increases governmental openness.

Despite the numerous legislative restraints on free speech the press has survived. Perhaps one of the few positive outcomes of the legislative acts has been a more careful and thorough reporting on the part of journalists. The press has restrained from sensationalizing sensitive events.

If a majority consensus is to arise in South Africa regarding political questions, then the press must be given increasing freedom to

explore issues and encourage debate and facilitate dissent. A free press is not a product of democracy. Rather, the government of South Africa must view the press as an essential element in the process of peaceful change, as a chain of communication which links the races, not as the messenger of bad news.

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